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## CAPTAIN RUDOLPH ADRAIN JOSEPH

**v.**

## MALAYSIAN AIRLINE SYSTEM BHD & ANOR; CIMB BANK BHD (GARNISHEE)

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HIGH COURT SABAH & SARAWAK, KUCHING
ABDUL AZIZ RAHIM J
[SUIT NO: 22-86-2007-II]
11 JANUARY 2008

C

***CIVIL PROCEDURE:*** *Attachment - Garnishee order - Application for - Grounds - Non-compliance with terms of consent judgments - Whether there was consent to variation of terms - Rules of the High Court 1980, O. 49 rr. 1, 2*

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***CIVIL PROCEDURE:*** *Judgment - Consent judgment - Non-compliance with terms - Whether there was consent to variation of terms*

***CIVIL PROCEDURE:*** *Consent order - Variation - Principles applicable - Whether there was consent to variation of terms*

E

***CIVIL PROCEDURE:*** *Affidavits - Affidavits in support of application - Averment or assertion made therein - No dispute or challenge - Whether such averment or assertion must be taken as true*

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This was the plaintiff's application by *ex parte* summons in chambers ('encl. 43') for a garnishee order under O. 49 rr. 1 and 2 of the Rules of the High Court 1980, the sum to be garnished or attached being in the amount of RM1,384,383.80. This application was grounded on para. (6) of a consent order entered into between the plaintiff and defendants on 19 December 2007 ('2nd consent judgment'), which was due or had become due by the 1st defendant to the plaintiff. The plaintiff contended that the 1st defendant had breached paras. (1) and (2) of the 2nd consent judgment by its failure to reissue directly to the plaintiff a letter of appointment in accordance with the consent judgment entered into between the plaintiff and defendants on 14 June 2007 ('1st consent judgment'), the terms of the Malaysian Airlines Pilots' Association agreement 2004-2007 ('MAPA agreement 2004-2007') and the 2nd consent judgment itself. It must be noted 2nd consent judgment was agreed to by the parties pursuant to an earlier application ('encl. 23') filed by the plaintiff seeking, *inter alia*, compliance by the 1st defendant with the terms and conditions of

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cls. (1) to (3) of the 1st consent judgment; encl. 23 resulted from the plaintiff rejecting a revised letter of offer of employment by the 1st defendant to the plaintiff on the ground that it did not comply with the 1st consent judgment.

**Held (allowing the application):**

**(1)** On the facts and evidence in the affidavit supporting the plaintiff's application in encl. 43, it was clear that the 1st defendant had failed to comply with the terms of the two consent judgments. It would appear, on the facts, that the revised letter of offer dated 4 October 2007 issued to the plaintiff was the first attempt to vary the terms of the consent order by not including in the offer the entitlements of the employment due to the plaintiff as agreed and envisaged in the consent judgments in the spirit of the MAPA agreement 2004-2007. This variation was not with the consent of the plaintiff. *Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors* (foll). The 1st defendant did not file any affidavit in opposition the plaintiff's application in encl. 23. Therefore, the averments or assertions made by the plaintiff, in his affidavits in support of the application, ought to be taken as correct or the truth. The law is settled on this point: that is when a party made a positive averment or assertion in an affidavit, and the other party does not dispute or challenge such averment or assertion, then the averment or assertion must be true. (para 29)

**Case(s) referred to:**

*Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC* ***(refd)***

*Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors [1998] 2 CLJ 845 CA* ***(foll)***

*Zainudin Muhammad v. Atsco Ltd & Anor [2003] 1 CLJ 446 CA* ***(refd)***

**Legislation referred to:**

Rules of the High Court 1980, O. 14 r. 1, O. 14A r. 1, O. 45 r. 11, O. 49 rr. 1, 2, O. 92 r. 4

*For the plaintiff - Shankar RP Asnani (Francis Teron with him); M/s Thomas, Shankar Ram & Co*

*For the 1st & 2nd defendants - Jubilant Austinway (Gerawat Gala with him); M/s Zaid Ibrahim & Co*

*For the garnishee - Azrin Ahmat; M/s Idris & Co*

*Reported by Suresh Nathan*

## JUDGMENT

**Abdul Aziz Rahim J:**

**[1]** This is the 1st defendant's appeal against my decision in encl. 43.

**[2]** Encl. 43 is the plaintiff's application by Ex parte Summons In Chambers for Garnishee Order under O. 49 rr. 1 and 2 RHC 1980. The sum to be garnished or attached is RM1,384,383.80 ("the garnishment sum") in the hand of or coming into possession of the garnishee that CIMB Bank Berhad to answer a judgment recovered by consent against the 1st defendant by the plaintiff in the High Court Kuching on 19 December 2007. I granted order in terms of the application with costs to the plaintiff.

**[3]** The application (encl. 43) is grounded on para (6) of the consent order entered into between the plaintiff and the defendants on 19 December 2007 ("the 2nd consent judgment") which is due or has become due by the 1st defendant to the plaintiff. The plaintiff contended that the 1st defendant had breached paras (1) and (2) of the 2nd consent judgment by its failure to reissue directly to the plaintiff or caused to be reissued to the plaintiff a letter of appointment in accordance with the consent judgment entered between the plaintiff and the defendants on 14 June 2007 ("the 1st consent judgment"), the terms of the MAPA agreement 2004-2007 and the 2nd consent judgment itself.

**[4]** Enclosure 73 is the 1st defendant's application by way of summons in chambers under O. 45 r. 11 and O. 92 r. 4 RHC 1980 for stay of execution and all proceedings to enforce the garnishee order absolute dated 11 January 2008 pending the determination and disposal of the appeal by the 1st defendant against my decision in encl. 43. Further and in the alternative, the 1st defendant also sought orders for interim injunction to restrain the plaintiff or his servants or agents from dissipating or dealing with the garnishment sum paid by the garnishee pending the disposal of the 1st defendant's appeal and also for mandatory injunction against the plaintiff to compel him to return the garnishment sum he received from the garnishee pursuant to the garnishee order absolute within seven days from the date of the order.

**[5]** This application (encl 73) is grounded on several grounds. Firstly, the garnishment sum had been paid by the garnishee to the plaintiff. Secondly, the plaintiff is unemployed and does not have a source of income. Thirdly, there is a real danger that the garnishment sum be dissipated and that the plaintiff would not be able to reimburse the same to the 1st defendant in the event the 1st defendant's appeal is successful and thereby renders the appeal nugatory. Fourthly, there is necessity to protect and preserve the garnishment sum from being dissipated. Fifthly, the 1st defendant is in a strong financial position and is able to satisfy any judgment or order of the court or the Court of Appeal made against it in favour of the plaintiff. Sixthly there are special circumstances to justify the grant for the stay order.

## Background Facts

**[6]** On 28 May 2007 the plaintiff, a senior captain working for the 1st defendant filed a suit (encl. 4) against the 1st defendant seeking various reliefs including specific performance of the plaintiff's contract of employment for which the 1st defendant is bound to employ the plaintiff until the age of 60 and to retire in the year 2012 on terms and conditions not less favourable than those contained in the MAPA Agreement 2004-2007 entered into between the 1st defendant and the 2nd defendant which guarantees the plaintiff's rights without discrimination.

**[7]** There has never been any dispute about the terms and conditions of the MAPA Agreement 2004-2007 being binding on the 1st defendant which guarantees and protects the plaintiff's rights to be employed up to the age of 60 on terms and conditions that are not less favourable.

**[8]** In a related development, the plaintiff has filed a summons in chambers (encl. 8) seeking various declaratory orders against the 1st and 2nd defendants. The application in encl. 8 was made pursuant to O. 14 r. 1 and O. 14A r. 1of the RHC 1980. Among the orders sought in encl. 8 are: firstly, a declaration that the MAPA Agreement 2004-2007 between the 1st defendant and 2nd defendant is binding on the 1st defendant. Secondly, a declaration that the term 'subject to F50 aircraft being operated by the 1st defendant' in the plaintiff's contract of employment is in contravention of the MAPA Agreement 2004-2007 or its implied terms and conditions and discriminatory therefore void being

unlawful and contrary to public policy and the Federal Constitution. The application in encl. 8 is prompted by the fact that under the MAPA Agreement 2004-2007 all pilots of the 1st defendant and the plaintiff are guaranteed employment without discrimination till age of 60 subject to being medically fit, a test which the plaintiff had undergone and succeeded. Then by letter dated 26 January 2006 the 1st defendant issued to the plaintiff in Kuching by their office in Kuching that the plaintiff's employment was continued and accepted to be employed as pilot up to the age of 60. However subsequently, the 1st defendant issued a letter dated 24 November 2006 terminating the plaintiff's services. The 1st defendant did not file any affidavits to oppose the plaintiff's summons in chambers in encl. 8 or to challenge the averments and depositions contained in the plaintiff's affidavit in support of encl. 8 affirmed by the plaintiff on 30 May 2007. Instead on 14 June 2007 the parties entered consent judgment on the terms of the consent order in encl. 20. With that the suit in encl. 4 and the application in encl. 8 were brought to their final conclusion.

**[9]** Clause (1) to (3) of the consent judgment dated 14 June 2007 (the 1st consent judgment – exh. R20) reads as follows:

MALAYSIA
IN THE HIGH COURT IN SABAH AND SARAWAK
AT KUCHING
SUIT NO: 22-86-2007-II

BETWEEN

CAPTAIN RUDOLPH ADRAIN JOSEPH
Also known as Rudolph Adrian Joseph,
[W.N.K.P. No.520126-08-5521]
No. 26, Lot 1569, Lorong Angsana 5B,
Jalan Pisang Barat,
93150 Kuching, Sarawak ... Plaintiff

AND

MALAYSIAN AIRLINE SYSTEM BERHAD
A Company registered under the Companies Act 1965 With Company No. 10601-W
Having a Registered and Business Address at:
Tingkat 3, Administration Building 1, MAS Complex A, Sultan Abdul Aziz Shah Airport,
47200 Subang, Selangor.

Also having a place of business
At Lot 215, Bangunan MAS,
Jalan Song Thian Cheok,
93100 Kuching, Sarawak. ... 1st Defendants

Capt. Hizamuddin Bin Zainal Abidin and
Capt. Ahmad Zainurrashid Bin Bunyamin
Sued in their capacity as
THE PRESIDENT AND HONORARY SECRETARY Of MALAYSIA AIRLINES PILOTS' ASSOCIATION
An association registered in Selangor under Section 7 of the Societies Act 1966 with registration number 1296 (Selangor) and having its registered place of business or address at No. 11-3 (2nd Floor), Jalan USJ 21/8, 47630 UEP Subang Jaya,
Selangor. ... 2nd Defendants

BEFORE THE HONOURABLE JUDICIAL COMMISSIONER TUAN HAJI HAMID SULTAN BIN ABU BACKER, HIGH COURT II, KUCHING

IN CHAMBERS

CONSENT JUDGMENT

UPON HEARING Mr. Shankar Ram Pohumall Asnani of Counsel for the Plaintiff, Mr. Jubilant Austinway of Counsel for the 1st Defendants and Mr. Shankar Ram Pohumall Asnani standing in for Mr. Shenton Maniam, of Counsel for the 2nd Defendants BY CONSENT AND WITHOUT ADMISSION OF LIABILITY IT IS HEREBY ORDERED that:

(1) The Plaintiff be re-employed with the 1st Defendants and to be redeployed to any aircraft fleet not limited to F50 Fleet, if required, to any base or location to be determined by the 1st Defendants, either to the 1st Defendants main or subsidiary companies and be paid salary based on no loss of seniority and also be given full benefits and perks based on the MAPA Agreement 2004-2007, which includes guaranteed monthly productivity, housing allowance etc. previously enjoyed prior to his termination;

(2) In accordance with (1) above, the Plaintiff be re-employed with the 1st Defendants up to 26th January 2012 and in accordance with the MAPA Agreement 2004-2007;

(3) That the Plaintiff be paid full back wages based on his last drawn salary with the 1st Defendants from February 2007 up to date the Plaintiff is re-employed with no interest;

(4) The parties shall be at liberty to apply at any time for directions and for compliance with terms (1) to (3) above;

(5) Each party to bear its own costs and this suit be withdrawn;

(6) Upon completion of orders (1) to (5) above, the Plaintiff shall have no claims of whatsoever nature against the 1st and 2nd Defendants;

(7) As between the Plaintiff arid the 2nd Defendants, the Plaintiff shall have no claims against the 2nd Defendants and the parties shall bear their own costs.

Dated this 14th day of June 2007.

Sgd.
Senior Assistant Registrar
High Court II Kuching.

This Consent Judgment is filed by Messrs. Thomas, Shankar Ram & Co. Advocates, Advocates for the Plaintiff, whose address for service is at No. 5, 1st Floor, Carpenter Street, 93000 Kuching, Sarawak.

INDORSEMENT

TO: (1) MALAYSIAN AIRLINE SYSTEM BERHAD
A Company registered under the Companies Act 1965
With Company No. 10601-W
Having a Registered and Business Address at:
Tingkat 3, Administration Building 1, MAS Complex A,
Sultan Abdul Aziz Shah Airport,
47200 Subang, Selangor.
Also having a place of business
At Lot 215, Bangunan MAS,
Jalan Song Thian Cheok,
93100 Kuching, Sarawak.

(2) Capt. Hizamuddin Bin Zainal Abidin and
Capt. Ahmad Zainurrashid Bin Bunyamin
Sued in their capacity as
THE PRESIDENT AND HONORARY SECRETARY
Of MALAYSIA AIRLINES PILOTS' ASSOCIATION
An association registered in Selangor under Section 7 of the Societies Act 1966 with registration number 1296

(Selangor) and having its registered place of business or address at No. 11-3 (2nd Floor), Jalan USJ 21/8, 47630 UEP Subang Jaya, Selangor.

NOTICE
(Order 45 rule 7)

TAKE NOTICE that if you, the within-named, MALAYSIAN AIRLINE SYSTEM BERHAD by yourself, your servants or agents, each of you, jointly or severally disobey this CONSENT JUDGMENT you will be liable to process of execution for the purpose of compelling you to obey the same.

Dated this 18th day of June, 2007.
Sgd.
Messrs Thomas, Shankar Ram & Co.,
Advocates for the Plaintiff.

**[10]** Subsequent to the 1st consent order, the 1st defendant issued a letter dated 4 October 2007 – exh. R21 – to the plaintiff offering the plaintiff employment as F-50 Commander on fixed term contract commencing on 18 October 2007 and expiring 25 January 2012 under Responsibility Centre 68KUL717. The letter exh. R21 contained all the terms and conditions of the plaintiff's employment including the salary to be paid to the plaintiff, accommodation, housing allowance, travel benefits, annual leave and medical leave and such other terms and conditions of employment purportedly in compliance with the terms of the 1st consent order. The material clauses in the letter exh. R21 that become the bone of contention between the parties are as follows:

malaysia
AIRLINES

CONFIDENTAL

04th October 2007
HR(R) 5.5.2-0857/07

Captain Rudolph Adrain Joseph
S/No : 0324216
Lot 1569, Lorong Angsana 5B
Pisang Road West
93150 Kuching, SARAWAK.

Dear Captain Rudolph,

OFFER OF EMPLOYMENT ON A FIXED TERM CONTRACT

We are pleased to offer you employment as F50 Commander on a fixed term contract commencing on 18th October 2007 and expiring on 25th January 2012, under Responsibility Centre 68KUL717.

This offer of employment is subject to the following conditions:

1.1 Your passing a medical examination by a doctor nominated by Malaysia Airlines;

1.2 Your passing all the proficiency checks; for the entire duration of this contract.

02. **Salary**
You shall be paid a salary of RM19,012.8 per month.

03. **Terms and Condition of Employment**
Unless otherwise stated herein, your other terms and condition of employment shall, where applicable be in accordance with the attached "Memorandum of Understanding between Malaysia Airlines System Berhad and Malaysia Airlines Pilot's Association On Terms and Conditions of Employment of Pilot 2004-2007".

04. **Employee Provident Fund (EPF)**
You may choose to be a member of the Employee Provident Fund (EPF) if you wish to do so.

05. **Taxation**
You shall be personally responsible for the income tax liabilities on your salary, allowances and other prerequisites of employment.

Subsequent to the above, with immediate effect, you shall be posted to MASWings Sdn Bhd, based in Miri, Sarawak until the cessation of your employment with MAS. The following shall be the terms of your posting:

01. **The Position**
Commander F50

02. **Salary**
There will be no change in your grade, salary and salary scale and you shall continue to be remunerated based on your current grade, salary and salary scale.

03. **Base**

During the posting period, you will be based in Miri, Sarawak and shall be operating out of the following station:-

Miri, Sarawak.

You shall be provided with free travel from Kuching (KCH) to Miri (MYY) for the commencement of posting.

04. **Accommodation**

You and your spouse will be provided with basic hotel accommodation for the first 14 (fourteen) days of the posting, after which you shall be responsible for obtaining your own accommodation and for the payment of such posting.

In addition, the company shall provide an additional double-room for every 02 (two) children that accompany you at the place of posting (if applicable), during the same period as above.

05. **Transportation**

MASWings Sdn Bhd will provide suitable ground transportation from your place of residence to the airfield for when you are to carry out your duties hereunder.

If you are required to night stop at stations other than Miri, you will be provided with transportation by MASWings Sdn Bhd.

06. **Allowances**

During the first 14 (fourteen) days of your posting, you shall be paid a daily allowance of RM81.00.

You shall also be eligible to receive a monthly housing rental subsidy of RM900.00 during the entire posting period.

07. **Travel Benefits**

Your wife and children (if applicable) will be provided with free subject-to-load air travel on Company's services once a month to the place of posting and for return to KUL, as stipulated in the current terms of your employment with the Company.

08. **Annual Leave and Medical Leave Certificates**

During this period of posting, your application for annual leave and submission of medical leave certificates shall be forwarded to the Chief Pilot, MASWings Sdn Bhd for approval. Upon receipt of approval, the said application shall be forwarded to Ops Control Manager (Crew Planning and Scheduling) Malaysia Airlines for administrative purposes. Please clear all annual leave earned during your posting prior to reporting back for duty with the Company.

09. **Confidentiality**

You shall treat all data, reports and information disclose to you or received by you or discovered by you in the course of your posting, as strictly confidential and shall not at any time communicate the same to any third party.
Please note that the Official Secrets Act 1972 shall apply to all data, reports, information and any materials originating from your posting.

10. **Other Terms and Conditions**
The terms and conditions mentioned above are not exhaustive but highlight the salient ones only.
Other terms and conditions applicable during the posting period shall be as set out in the Memorandum of Understanding Between Malaysian Airline System Berhad and Malaysian Airline Pilot's Association of Terms and Conditions of Employment of Pilots 2004-2007.

We are confident that you will execute your duties and responsibilities with full commitment and professionalism. Your contribution to the Company is greatly appreciated and should set as an example for others to follow.

Kindly indicate your acceptance of this offer by signing and returning the duplicate copy of this letter by 16th October 2007.

We look forward to your joining the Company and wish you a rewarding career with Malaysia Airlines.

Yours sincerely,

Sgd.
Effendi Abd Rahman
Senior General Manager, Human Resource

cc : SGM Flight Operations
Manger Insurance
Senior Manager, HR Services (KLIA).

**[11]** In the letter exh. R21 the plaintiff was given until 16 October 2007 to indicate his acceptance of the offer.

**[12]** The plaintiff alleged that the 1st defendant's letter of offer exh. R21 did not comply with the terms of the 1st consent order. In addition, the plaintiff also alleged that the letter was received by the plaintiff only on 16 October 2007 – a delay of 120 days

from the date of entry of the 1st consent judgment. The plaintiff then filed a summons in chambers' application in encl. 23 to seek *inter alia* an order that the 1st defendant complies with the terms and conditions of cl. (1) to (3) of the 1st consent judgment. Specifically the orders sought by the plaintiff were the following:

> (1) The Plaintiff be re-employed with the 1st Defendants and to be redeployed to any aircraft fleet not limited to F50 Fleet, if required, to any base or location to be determined by the 1st Defendants, either to the 1st Defendants main or subsidiary companies and be paid salary based on no loss of seniority and also be given full benefits and perks based on the MAPA Agreement 2004-2007, which includes guaranteed monthly productivity, housing allowance etc. previously enjoyed prior to his termination;
>
> (2) In accordance with (1) above, the Plaintiff be re-employed with the 1st Defendants up to 26th January 2012 and in accordance with the MAPA Agreement 2004-2007;
>
> (3) That the Plaintiff be paid full back wages based on his last drawn salary with the 1st Defendants from February 2007 up to date the Plaintiff is re-employed with no interest;.

**[13]** The plaintiff's application in encl. 23 is supported by the plaintiff's affidavit affirmed on 22 October 2007. Several grounds were advanced for the application. Firstly, the 1st defendant's letter, exh. R21 was issued in derogation and disobedience of the clear terms and conditions of the 1st consent judgment. Secondly, the application was absolutely necessary due to the lackadaisical or contumelious approach taken by the 1st defendant. Thirdly, the terms offered by the 1st defendant to the plaintiff *vide* their letter exh. R21 are inconsistent with MAPA Agreement 2004-2007 and therefore inconsistent with the terms of the 1st consent judgment. Fourthly, unless strict compliance with the terms of the 1st consent judgment is ordered, the 1st defendant would make a mockery of the agreement (in terms of the consent judgment) entered between the parties. Fifthly, because of the 1st defendant's lackadaisical approach a situation was created whereby the plaintiff is in dire financial crisis, not being able to take up employment with other airlines, having to wait without salary and having to support his family and children.

**[14]** At this juncture, it is pertinent to note that from the date of entry of the 1st consent judgment up to the date of the 1st defendant's letter, exh. R21, the 1st defendant did nothing at all to comply with the said consent judgment. This is the incontrovertible fact. The Federal Court in *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61, held at p. 62 that 'the effective date of judgement ... was the date of pronouncement in open court and not the date when it was signed ...'. In this case when the plaintiff filed the summons in chambers in encl. 23 for enforcement of the judgment in that the plaintiff is seeking an order to direct the 1st defendant to comply fully with the terms of the 1st consent order, there was already a delay of 120 days from the date of the 1st consent judgment to the date the 1st defendant issued the offer letter exh. R21. This delay is not denied or challenged by the 1st defendant. In his application in encl. 23, the plaintiff prays for alternative prayer in para (6) that in the event the 1st defendant refuses or fails to re-issue the letter of offer to the plaintiff within seven days from the date of the order incorporating all the amendments sought in orders (1) and (2) prayed for in the summons in chambers, the 1st defendant is to pay the plaintiff a sum of RM1,384,383.80 being full wages up to 26 January 2021 inclusive of housing allowance and guaranteed monthly productivity of 50 hours at the rate of RM48 per hour.

**[15]** When the plaintiff's application in encl. 23 came up for hearing on 19 December 2007, the parties consented to record and enter a consent judgment on the terms prayed for by the plaintiff including the alternative prayer order (6). However subsequent to the recording of the consent judgment of 19 December 2007 (the 2nd consent judgment – exh. R27 in plaintiff's affidavit in support of encl. 43) there is still no full compliance by the 1st defendant. The plaintiff claimed that the 1st defendant's letter of 24 December 2007 (exh. R30(2)) issued purportedly in compliance with the 2nd consent order was not re-issued to the plaintiff as required by the terms in the 2nd consent order. The defects in the 1st defendant's letter of 24 December 2007 (exh. R30(2)) were drawn to the attention of the 1st defendant's advocates by the plaintiff's advocates *vide* three letters, exhs. R29, R30(1) and R31. However 1st defendant still did not take steps to amend their letters of 24 December 2007 to ensure compliance with the 1st and 2nd consent judgments. In

consequence thereof the plaintiff filed summons in chambers' application, encl. 43 against the garnishee to direct the garnishee to pay to the plaintiff as judgment creditor the garnishment sum agreed by the 1st defendant under prayer (6) of the 2nd consent judgment due from the garnishee to the 1st defendant. When encl. 43 came before me for hearing, the garnishee did not object to the application and in fact informed the court that it had the amount of money in the sum sought by the plaintiff and due to the 1st defendant. I also found that the 1st defendant had not complied with the terms of the 1st and 2nd consent judgments. Accordingly I allowed the plaintiff's application for garnishment absolute in encl. 43.

**[16]** The 1st defendant then filed encl. 73 for stay of the garnishment absolute order and also for orders ordering the plaintiff to return the money paid to his account by the garnishee back to the garnishee and also to restrain the plaintiff from using or spending the money so received.

**[17]** With that background scenario, I will now deal with the plaintiff's application in encl. 43 and then I will state my reasons for my decision to dismiss encl. 73, the 1st defendant's application for stay and injunction in another separate grounds.

**[18]** As stated above, encl. 43 is the plaintiff's action to enforce the 2nd consent judgment which has been agreed to by the parties pursuant to the plaintiff's application in encl. 23. In particular the plaintiff wanted the 1st defendant to comply with the alternative prayer in para (6) of encl. 23 ie to pay the plaintiff all the backwages inclusive of the allowances and forget about the re employment of the plaintiff till the year 2012.

**[19]** In arguing the encl. 43 application, counsel for the plaintiff submitted that even after the 2nd consent judgment the 1st defendant still failed to reissue the offer letter that would take back the plaintiff into the employment of the 1st defendant on the terms and conditions agreed in the 1st consent order.

**[20]** Following the 2nd consent judgment, the 1st defendant issued a letter dated 24 December 2007 (exh. R30(2)) referring to the two consent judgments and enclosing the revised letter of offer of employment for the plaintiff (exh. R30(3)). The letter of offer is a letter offering the plaintiff's employment with the 1st defendant purportedly on the terms agreed in the 1st and 2nd consent

judgments. But the letter indicated to the plaintiff that he must accept the offer before 16 October 2007. The letter of offer (ie exh. R30(3)) was a revised letter of offer and was dated 4 October 2007 because it was originally issued on that date in the wake of the 1st consent order. But it was rejected by the plaintiff as being not in compliance with the 1st consent order; as a result of which the plaintiff filed an application under encl. 23 and obtained the 2nd consent judgment. This explains why in the letter exh. R30(2) the plaintiff was asked to indicate his acceptance of the offer by 16 October 2007. However, learned counsel for the plaintiff argues that this not only constituted a breach of the consent order which required the letter offer to be sent directly to the plaintiff and not through the advocates; but also the 1st defendant is requesting the plaintiff to do the impossible by asking the plaintiff to indicate acceptance of the offer by or before 16 October 2007 when the letter enclosing the revised offer itself was dated and sent on 24 December 2007.

**[21]** The plaintiff also complained that the 1st defendant's letter of 24 December 2007 (exhs. R30(2) and R30(1)) had breached specific terms of the 2nd consent judgment by omitting or excluding from the offer certain allowances such as the housing allowance at RM900 per month that the plaintiff would be entitled to under the terms of the 1st consent judgment in accordance with the MAPA Agreement 2004-2007 which is binding on the 1st defendant. This non compliance the plaintiff argues is inspite of the exchange of correspondences between the plaintiff's advocates and the 1st defendant's advocates before the issuance of the 1st defendant's letter of 24 December 2007, in an attempt to find the right and appropriate way to draft the offer letter to the plaintiff so that it can be in full compliance with the two consent judgments. This exchange of correspondences is evident by exh. R28(2) the defendant's advocates letter dated 21 December 2007 to the plaintiff's advocates and the response by the plaintiff's advocates in exh. R28(1), a letter dated 22 December 2007 to the defendant's advocates.

**[22]** In exh. R28(1), the plaintiff's solicitor letter dated 22 December 2007 to the 1st defendant's solicitor in response to an undated draft letter (exh. R28(2) faxed to the plaintiff's counsel by the 1st defendant's counsel, learned counsel for the plaintiff pointed out several flaws in the draft letter (which was meant to

be sent to the plaintiff by the 1st defendant) that do not comply with the 2nd consent judgment. In the same letter ie exh. R28(1) plaintiff's counsel also reminded the 1st defendant's counsel that under 2nd consent judgment the time provided to the 1st defendant to comply is seven days and it also intimated to the counsel for the 1st defendant that in the event of non compliance the 1st defendant shall enforce order (6) of the 2nd consent judgment strictly.

**[23]** The plaintiff's counsel also sent exh. R29, a letter dated 24 December 2007, to the 1st defendant's counsel complaining about the 1st defendant revised letter of offer sent to the plaintiff as being non compliance with the two consent judgments and also not in accordance with the MAPA Agreement 2004-2007 which encompasses the spirit of the settlement between the 1st defendant and the plaintiff in the form of the two consent judgments. In the same letter the plaintiff's counsel gave notice to counsel for the 1st defendant to ensure full compliance by 4.30pm on 31 December 2007 failing which the plaintiff will enforce order (6) of the 2nd consent judgment without further reference to the 1st defendant or its counsel.

**[24]** In its affidavit in opposition, affirmed by one Zulhaimi bin Othman the 1st defendant's Assistant General Manager, Manpower Resourcing, Human Resource Division, the 1st defendant deposed that the plaintiff's application in encl. 43 is premature baseless and misconceived. It was deposed that the letter exh. R30(3) was issued by the 1st defendant to the plaintiff on 24 December 2007 incorporating terms of orders (1) and (2) of the 2nd consent judgment together with a cheque for the sum of RM208,657.72 through the plaintiff's solicitor for the plaintiff's backwages and other allowances as set out in cls. (3) and (5) of order 2 of the 2nd consent judgment. The 1st defendant deposed that letter exh. R30(2) and the cheque was sent to the plaintiff's solicitor for onward transmission to the plaintiff on 24 December 2007 ie within the seven days period as stipulated in the 2nd consent judgment.

**[25]** However the plaintiff's solicitor has responded to the letter exh. R30(2) on the same day alleging that the contents of the letter of offer are inconsistent with the terms and spirit of MAPA Agreement 2004-2007 and the 2nd consent judgment. The 1st defendant disagreed. However it was said in para 8 of the 1st

defendant's affidavit that the 1st defendant agreed to revise the wordings of the letter exh. R30(2) for the sake of clarity, in good faith and in the spirit of settlement. The 1st defendant also contended that when the plaintiff's solicitor in his letter dated 24 December 2007 in response to the 1st defendant's letter exh. R30(2) gave the 1st defendant until 4.30pm on 31 December 2007 the time for compliance by 1st defendant has thus been extended.

**[26]** In para 16 of the 1st defendant's affidavit in opposition, the 1st defendant admitted, following the plaintiff counsel's letter of 24 December 2007 exh. R30(1), seeking the views of the plaintiff's solicitor on the changes required to the 1st defendant's letter exh. R30(2). As a result the plaintiff counsel forwarded a draft version of the revised exh. R30(2) containing the plaintiff counsel's proposed changes which the 1st defendant deposed in its affidavit that it agreed to accept in good faith and in the spirit of settlement despite the fact that the proposed increase in backwages was not in accordance with the terms of the 2n consent judgment. The 1st defendant averred in its affidavit that it did not agree with other changes proposed by the plaintiff in exh. R34(2) which is inconsistent with the MAPA Agreement 2004-2007 and the terms of the consent judgment and which are new or additional terms not in the consent judgments or mutually agreed. But the 1st defendant did not spell out which were the proposals in the plaintiff solicitor's letter exh. R34(2) that it did not accept.

**[27]** In any event the 1st defendant did revise the letter of offer to the plaintiff by issuing a letter exh. R35 dated 27 December 2007. However the 1st defendant averred in its affidavit, at para 14, that it had issued the revised offer letter exh. R35 by mistake because that letter was the based on the unamended proposed draft by the plaintiffs solicitor in exh. R34(2). The 1st defendant then quickly issued a letter exh. R36(1) to revoke the offer letter exh. R35 and followed by a revised version of exh. R35 in the form of a letter exh. R36(3) and two cheques for the sum of RM254,808.88 being payment of the backwages calculated up to December 2007.

**[28]** So, is exh. R35 issued by mistake as claimed by the 1st defendant? I do not think so. Firstly, on receiving the plaintiff solicitor's proposed draft in exh. R34(2) the 1st defendant said that it realized that it was not what the 1st defendant thought to be the terms in the consent judgments; but nevertheless still agreed to accept it for the sake of settlement. Secondly, in the plaintiff's affidavit in reply to the 1st defendant's affidavit in opposition the plaintiff had deposed that after the letter exh. R35 was issued there was telephoned conversation and correspondence by e-mail between the plaintiff's advocates and the 1st defendant's advocates, Mr. Jubilant Austinway persuading the plaintiff to accept the' offer in the letter exh. R35. This fact was not denied in the 1st defendant's affidavit in opposition II affirmed by Mr. Jubilant Austinway on 11 January 2008 in which at para 5(1) of the affidavit Mr. Jubilant Austinway said the e-mail correspondences were 'to facilitate and to resolve once and for all issues arising' from the 1st defendant's letter exh. R30(3) dated 4 October 2007. This would show that the 1st defendant intended to comply fully with the terms of the consent judgments in the manner proposed by the plaintiff's advocates in exh. R34(2). But on the eleventh hour the 1st defendant changed its mind. Thirdly, the 1st defendant's counsel who had been in negotiation with the plaintiff's advocates over the draft of the offer letter did not take any step to inform the plaintiff's advocates the parts of the proposal contained in exh. R34(2) that were not acceptable to the 1st defendant upon realizing that they were purportedly not part of the consent judgments, before issuing the revised offer in exh. R35 to the plaintiff.

**[29]** On the facts and evidence disclosed in the affidavit supporting the plaintiff's application in encl. 43 as briefly alluded to above, I am satisfied that the 1st defendant has failed to comply with the terms of the two consent judgments. It would appear that the revised letter of offer dated 4 October 2007 issued to the plaintiff *vide* letter dated 24 October 2007 is the 1st attempt to vary the terms of the consent order by not including in the offer the entitlements of the employment due to the plaintiff as agreed and envisaged in the consent judgments in the spirit of MAPA Agreement 2004-2007. This variation is not with the consent of the plaintiff. In *Visia Finance Bhd v. Expert Credit & Leasing Sdn Bhd & Ors* [1998] 2 CLJ 845 it was said, at p. 854, that "[A]n order made by consent in the absence of fraud, can

A only be varied by consent. It would be a denial of justice to permit a party to resile from what his counsel decided for him merely because he lost". See also the case of *Zainudin Muhammad v. Atsco Ltd & Anor* [2003] 1 CLJ 446 CA. The 1st defendant did not file any affidavit in opposition to the plaintiff's application
B in encl. 23. Therefore the averments or assertions made by the plaintiff, in his affidavits in support of the application, ought to be taken as correct or the truth. The law is settled on this point: that is when a party made a positive averment or assertion in an affidavit, and the other party does not dispute or challenge such
C averment or assertion, then the averment or assertion must be true.

**[30]** For the above reasons I allowed the plaintiff's application in encl. 43.

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